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Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-752

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole

and

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., ET AL., *Respondents.*

BRIEF OF UNITED STATES CATHOLIC CONFERENCE AMICUS CURIAE

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CONSENT OF THE PARTIES

Both the petitioner and the respondent have consented in writing to the filing of this brief.

IDENTIFICATION AND INTEREST OF AMICUS

The USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of the USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immi-

grant aid, poverty assistance, civil education, youth activities, communications and public affairs, with emphasis on the preservation of religious liberty in America.

Among its responsibilities, the USCC is authorized to represent the Catholic people of the United States, speaking through their Bishops on matters of public concern. When deemed appropriate, the USCC is authorized to offer its views, if permitted by court rule or practice, in Federal and State court litigation touching important interests of the Catholic people in the United States, especially in cases involving constitutional issues turning upon the proper construction of the First Amendment of the Constitution of the United States.

It is the concern of the USCC that the fulfillment of the mission of the Roman Catholic parochial school system not be interfered with by the jurisdiction of a Federal agency concerned with labor relations over the schools' teachers.

In 1978, 9,902 Catholic elementary and secondary schools served the educational needs of almost three and one-half million students. The Bishops of the United States and the USCC are committed to the belief that Catholic schools fulfill a crucial mission; that is, of providing an educational environment in which children and young people can "experience learning and living fully integrated in the light of faith . . . students are instructed in human knowledge and skills, valued indeed for their own worth but seen simultaneously as deriving their most profound significance from God's plan for His Creation."

The jurisdiction of the NLRB over teachers in Catholic elementary and secondary schools must be constitutionally forbidden. Such governmental interference in the operation of a religious enterprise is in violation of the Free Exercise Clause and inconsistent with prior decisions of this Court. For the reasons stated below, this Amicus supports the appellee in urging the Court to affirm the decision of the Seventh Court of Appeals.

ARGUMENT

I.

Proper Reading of Free Exercise Clause Requires Government to Protect Institutional Integrity of Churches

The development of the body of law touching on the First Amendment Religion Clauses has been hindered because there has never been a proper explication of these clauses. The Court has often remarked on the difficulty which is attendant upon the adjudication of cases involving the Religion Clauses. *Roemer* v. *Board of Public Works of Maryland,* 426 U.S. 736, (1976). This difficulty has sprung primarily from the dicta of Justice Black in *Everson* v. *Board of Education,* 330 U.S. 1 (1947) in which he expressed the opinion that the Establishment Clause required strict government neutrality through the erection of a "wall of separation between church and state." Such a view not only misconstrues the Establishment Clause but also distorts the proper development of the Free Exercise Clause, Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: The University of Chicago Press, 1967) p. 172.

It is the view of this Amicus that the Free Exercise and the Establishment Clauses must be read in har-

mony, rather than in the dichotomous fashion which has been a recent characteristic of constitutional adjudication of the Religious Clauses.

On the one hand, we believe that the Free Exercise Clause requires government to respect both the existence and the work of religious institutions in our society as well as the protection of the individual rights of worship and belief. Secondly, we view the Establishment Clause as prohibiting government from formally establishing state religion or preferring one religion or religious institution over another in the granting of benefits or the imposition of obligations.

The Free Exercise Clause guarantees the rights of churches to maintain not only a doctrinal integrity in the face of adverse government action but also to maintain an institutional integrity. This institutional integrity is an important value in its own right; it is also, in many cases, an essential underpinning of doctrinal integrity, which may be impossible to maintain in face of pressures impinging upon church institutions that, as it were, provide a corporal endowment of doctrinal concerns and an essential medium for their transmission. With respect to the NLRB assertion of jurisdiction in the instant case, it is our conviction that such action violates the Free Exercise Clause of the First Amendment by failing to respect the institutional integrity of the church-related institutions and, indeed, of the church itself in its institutional aspect. The effect of the NLRB's *sua sponte* assertion of jurisdiction over these institutions is for that agency to engraft itself in an institutional fashion onto these sectarian institutions. The decision as to whether or not such a relationship threatens the institutional integrity of these institutions is properly made

by the appropriate ecclesiastical authorities rather than by government.

II.

Prior Adjudication of Free Exercise Clause Manifests Affirmative Duty in Government to Respect Institutional Integrity of Churches

Nowhere in the Solicitor's brief is there any recognition of the fact that the First Amendment's Free Exercise Clause relates to the institutional church as well as to individual rights of worship. Significantly, the Solicitor fails to mention either *Kedroff* v. *St. Nicholas* 344 U.S. 94 (1952) or *Kreshik* v. *St. Nicholas Cathedral,* 362 U.S. 190 (1960), two of the leading cases on the question of First Amendment protection for religious institutions *qua* institutions. The asserted Board jurisdiction is, we are told, justified by compelling government interests and would not require the employers to take action inconsistent with their religious beliefs. Such a framing of the issues totally ignores the institutional dimensions of the problem presently before this Court.

The NLRB has taken the view that it will only be concerned with secular matters. To be sure, these schools do have a secular dimension. In point of fact, this Amicus has repeatedly called this Court's attention to the legitimate secular function performed by the schools in educating many of the youth of our country. Nevertheless, we have always readily acknowledged that such institutions are in fact part of the institutional structure of the Roman Catholic Church in the United States.

The substantive elements of the Church's theology are not at issue here nor is the issue presented here the nature of the subjects taught in the schools or

the conditions under which the instruction takes place. Rather, the question is whether or not the kind of ongoing supervision of this institution necessitated by the Board's assertion of jurisdiction compromises the institutional integrity of those institutions. The Seventh Circuit Court of Appeals found that the government admitted that, at some point, NLRB jurisdiction violates the Free Exercise rights of the institutions involved herein. *Catholic Bishop of Chicago* v. *NLRB,* 559 F.2d 1112, at pp. 1127-28. The finding that there is no dispute on this point is crucial as it leads to a narrowing of the issue presented for adjudication before this Court. A more precise formulation of the question is *who decides* when the nature of the institution has been altered or changed in a negative way by such a presence. The answer to these questions, it seems to us, is that the church must itself be the sole decision maker as to the nature of its institutions and consequently has the sole right to decide whether its institutions have been radically injured in this way.

The government has ignored the fact that protections under the First Amendment are manifold and that there are indeed many kinds of guarantees grounded in the First Amendment Free Exercise Clause. The existence of a panoply of rights protected by the Free Exercise Clause is readily verifiable. First there is the protection of the right to hold religious beliefs. The Supreme Court has repeatedly held that this right is a near absolute under our Constitutional system. In *Reynolds* v. *U.S.,* 98 U.S. 145 (1879), and in *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940) the court has juxtaposed freedom to believe with the freedom to act and referred to the near absolute freedom of belief and cautioned that the freedom to act is not nearly so absolutely protected.

It is important to understand, however, that neither *Reynolds* nor *Cantwell* stands for the proposition that religious activity is not protected by the First Amendment; they merely stand for the proposition that religious activity is not as fully protected as it the freedom to believe. There are a number of cases which recognize First Amendment protection of religious activity. This is necessary, among other reasons, because religious activity is an essential expression of such belief, as religious institutions are embodiments and underpinnings of such belief in our highly institutional society. In *Sherbert* v. *Verner,* 374 U.S. 398 (1963), *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972) and *West Virginia* v. *Barnette,* 319 U.S. 624 (1943), the Supreme Court found that the First Amendment protected religiously based activity even though that activity would otherwise have been illegal. The court has repeatedly found First Amendment protection for activity which was not directly related to religious worship but rather was necessarily implicated in the conduct of organized religion. See *Murdock* v. *Commonwealth of Pennsylvania,* 319 U.S. 105 (1943), *Ballard* v. *United States,* 329 U.S. 187 (1946). Moreover, the Court has held that the Free Exercise Clause prohibits government from penalizing those who participate in religious activity: See *Speiser* v. *Randall,* 357 U.S. 513 (1958); and *McDaniel* v. *Paty,* 98 S. Ct. 1322 (1978).

There is an institutional dimension to the protection afforded by the Free Exercise Clause as the court noted in *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952). A significant line of cases, beginning with *Watson* v. *Jones,* 80 U.S. 679 (1871), and continuing with *Gonzalez* v. *Roman Catholic Archbishop of Manila,* 280 U.S. 1 (1929), *Kreshik* v. *St. Nicholas Cathe-*

dral, 363 U.S. 190 (1960), *Presbyterian Church* v. *Blue Hall Memorial Presbyterian Church,* 393 U.S. 440 (1969), *Serbian Eastern Orthodox Diocese for the United States of America* and *Canada* v. *Milivojevich,* 426 U.S. 696 (1976), has held that the First Amendment mandates an affirmative duty upon the government to respect the internal autonomy of religious institutions.

Thus, it is well settled that religious activity and religious institutions are provided substantial protection by the Free Exercise Clause of the First Amendment. Moreover, it is equally clear that the full implications of the Free Exercise Clause have not been exhausted by these cases.

The wide variety of activities protected by the cases cited above manifests the operation of a more general principle of constitutional law. Specifically, that the Free Exercise Clause imposes upon government the obligation to respect both the existence and the work of religious institutions in our society as well as the duty to protect the individual's right to worship and belief. The matter presently before the court deals with the institutional aspects of First Amendment protection, and it is to these aspects which we shall now turn.

The instant case is, we suggest, unique in that it is an instance where there has been a direct institutional confrontation between church and state. Most prior adjudications of the Religion Clauses have in fact dealt with the church-state issue only obliquely. With the court's adoption of the "No Aid Rule" under *Everson,* a vast majority of First Amendment cases since that time have turned on the question of

whether or not certain government action is "aid or no aid." In addition, there have been cases dealing with the constitutionality of Sunday closing laws and the permissibility of prayer in public schools. In *Wisconsin* v. *Yoder,* supra, it is clear that the Amish were confronting institutional government. However, there were no Amish institutions involved in that confrontation. Thus, since *Everson,* the church-state issue has been litigated through mediating circumstances. The conflict before this court presents the church-state tension starkly.

Despite the uniqueness of the present situation, we suggest that it is a close analog to that found in the *Serbian Orthodox* line of cases: *Watson* v. *Jones, supra, Gonzales* v. *Roman Catholic Archbishop of Manila, supra, Kreshik* v. *St. Nicholas Cathedral of the Russian Orthodox Church of North America, supra, Presbyterian Church* v. *Blue Hull Memorial Presbyterian Church, supra.*

The decisions in this line of cases are predicated upon the principle that churches are by their nature *sui generis* institutions and must be free to be themselves. Specifically, the court has repeatedly stated that matters of custom and usage, internal policy, and ecclesiastical discipline are beyond the pale of the civil jurisdiction of any court under our constitutional system.

Mr. Justice Brennan, writing for the Supreme Court in *Serbian Eastern Orthodox Diocese, Etc.* v. *Milivojevich,* 426 U.S. 696 (1976) stated "the First and Fourteenth Amendments permit hierarchial religious organizations to establish their own rules and regulations for internal discipline and government . . . ." Similarly,

Mr. Justice Brennan noted the following in his concurring opinion in Maryland and *Virginia Elder of Ch. of God* v. *Ch. of God,* 90 S. Ct. 499, 500 (1970):

> "To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine."

The rationale given for lack of civil jurisdiction in such matters is that, in order for the court to involve itself, it must ultimately substitute its own judgment for that of the appropriate ecclesiastical authority of that church.

Admittedly, the Court has recognized that it perhaps lacks expertise sufficient to make a sound judgment with respect to ecclesiastical matters. Nevertheless, we submit that it is not lack of knowledge which undergirds the rationale of the *Serbian Orthodox* line of cases. Rather, it is the notion that in displacing the appropriate ecclesiastical authority the Court would, in fact, be imposing on that institution an order from without.

There is herein, we submit, a great wisdom. A church, particularly a hierarchical church such as the one presently before this Court, continually works to discern its own nature. Thus, autonomy with respect to internal affairs of such a church is not only a freedom for the church to be what it is, but it is also a freedom for it to become what it will.

The full thrust of the *Serbian Orthodox* line of cases is to protect the institutional integrity of hierarchical churches and other religious institutions. We submit

that there can be no protection of the inner workings of a church without a protection of the integrity of the institution as a whole and also in its various institutional parts.

Throughout the prior adjudication of the Free Exercise Clause, the Court has only faced situations where a particular doctrine or custom, usage or discipline was the subject of a dispute. The Court's response to such matters has been to leave the integrity of the institution intact by refusing to set itself at odds with institutional authority in the resolution of these disputes. In the instant case, we have a conflict involving not merely a facet of the church considered as an institution, but rather involving the church itself in its institutional embodiment and its relationship to an institution of government. Here is where the analogy becomes quite clear. If the integrity of the institution is to be protected, it can only effectively be protected if the institution as a whole is respected.

In the instant situation, the National Labor Relations Board (NLRB) has, *sua sponte,* taken upon itself jurisdiction to regulate an activity of a component of the Roman Catholic Church. By virtue of its decision to so extend its jurisdiction, the NLRB has sought to establish a more or less permanent institutional attachment to the sectarian institutions at issue here. The question which such a presence poses is whether or not the institutional integrity of the sectarian institution has been compromised. If it has, then we submit that the government has violated the First Amendment guarantees of the Free Exercise Clause of the United States Constitution.

How is it possible to establish whether or not such institutional integrity of these institution has been

compromised? The Court below found that the NLRB has already conceded the point that at some point the institutional integrity of the schools will be compromised. *Catholic Bishop of Chicago* v. *NLRB,* 559 F.2d 1112 at pp. 1127-28.

The issue in this case is who shall make the judgment as to when that point has been reached. We do know that the institutional presence of the NLRB has not been invited by the parties to the instant litigation, and can only conclude that the appropriate decision-making authorities within the church-related institutions have made the decision that such a presence does compromise their institutional integrity.

If the First Amendment provides protection for the institutional integrity of a church, we are impelled to the conclusion that the determination of when such integrity has been breached must ultimately remain with the sectarian institution itself. Such institutions are, as we have noted earlier, *sui generis* by nature, and the determination as to whether a particular contact with government is pernicious is one which not only ought but can best be made by such an institution itself rather than by the government. As a civil court's determination of matters concerning ecclesiastical custom, usage, or discipline not merely imposes upon but takes the place of the judgment of church authorities; so in the present case, for a civil court to propose to decide whether the institutional integrity of a church has been breached and violated would be for that court to take upon itself decisions concerning the very nature of the church which properly belong to church officials. If government, in the face of opposition from the duly appointed ecclesiastical officials, makes the decision that the institutional integrity has remained in-

tact, it can only do so by the imposition of a model of that church institution which differs from that maintained by the appropriate ecclesiastical officials. Such action, we submit, turns judges into ecclesiologists and is constitutionally impermissible as a violation of the Free Exercise Clause of the First Amendment. *Serbian Orthodox* v. *Milivojevich, supra.*

In the Roman Catholic Church, the care for the ordinary affairs of a diocese, including the management of its institutions, is entrusted to the resident Bishop who, because he does exercise such ordinary care, is normally referred to as the Ordinary. In the instant case, the Ordinaries charged with responsibility for the respective dioceses have made the decision that the institutional presence of the NLRB compromises the integrity of the institutions placed in their care. The Court must, as a matter of Free Exercise, understood not merely in its individual but its institutional dimension, protect the integrity of these institutions.

Who shall decide when this integrity is threatened? We suggest that the decision must be left with the Ordinary charged with responsibility for maintaining the integrity of said institutions. The Government cannot take upon itself to decide that the nature of these institutions has or has not been compromised. In doing so, government would ultimately be substituting its own judgment as to the nature of those institutions for that of the local Ordinary. The ultimate issue here is who shall make the judgment as to whether or not the institutional attachment sought by the NLRB is pernicious to the institutions under ecclesiastical care.

It must be borne in mind that we are speaking here of an institutional integrity that is not primarily physical in nature. We are not suggesting that the fire de-

partment has not the authority to close a religious school that does not meet the fire standards. Nor are we supposing that the sanitation code does not have any impact on sectarian schools as it relates to cleanliness and kitchen facilities. Rather, we are speaking of the vital institutional qualities which go to the very root of the institution, *qua* institution, and mingle inextricably with matters of belief and spiritual orientation. In the instant case, the dispute involves the relationship which is to exist between teacher and employer in a school, a relationship which this Court has repeatedly held to be of signal import to the institutional character of the school. *Meek* v. *Pittmyer,* 421 U.S. 349 (1925). Inevitably, the dispute touches upon the manner of resolving—and the *locus* of authority for resolving—such questions as *who* shall teach in a school and *under what conditions.* But, given the nature, mission, and sponsorship of the schools involved, these are not questions to be resolved by government. For it to presume and act otherwise is a violation of the Free Exercise Clause. The government, through the NLRB, has asserted that it has a determinative role to play in the definition of this relationship. In our view, because the matter involves the integrity of the institution, government does not have such a role, and, equally to the point, the right to say yea or nay with respect to a proposed government intervention of this nature must, under the First Amendment, reside with ecclesiastical authorities. The decision as to whether or not government has such a role to play must ultimately reside with the institutional authorities in charge of that institution, not with the government.

CONCLUSION

The shield of the First Amendment protects the exercise of religion. In doing so, it necessarily also protects the organized exercise of religion, which means that it protects the institutions which are the embodiment of such organized exercise. Finally, it means that it shields those institutions in such a way as to provide them with self determination as to what it is they are and how they will carry out their mission.

Respectfully submitted,

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